TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 509

UNITED STATES, PETITIONER,

vs.

VERMONT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1945
CERTIORARI GRANTED NOVEMBER 5, 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 509

UNITED STATES, PETITIONER,

VS.

VERMONT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

Civil Action No. 3177

UNITED STATES OF AMERICA, Plaintiff,

v.

CUTTING & TRIMMING, INC., CHITTENDEN TRUST COMPANY OF BURLINGTON; RAINBOW CHILDREN'S DRESS CO. OF NEW YORK, AND THE STATE OF VERMONT.

DOCKET ENTRIES

Mar. 10, 1961	Filed Complaint.
Mar. 10, 1961	Issued Summons and delivered same to Marshal for service.
Mar. 17, 1961	Filed Summons returned served in part.
Mar. 18, 1961	Filed Notice of Appearance of George R. McKee, Esq., for defendant Chittenden Trust Company of Burlington.
Apr. 4, 1961	Filed Answer of Defendant State of Vermont, notice of appearance of Thomas M. Debevoise, Esq., Attorney General, and John D. Patterson, Esq., Deputy Attorney General, for the State of Vermont and certificate of service. Mailed copy to George R. McKee, Esq.

[fol. 2]

Apr. 5, 1961	Filed Answer of the Defendant, Chittenden Trust Company, Certificate of Service, and Notice of Appearance of George R. McKee, Esq. for Defendant, Chittenden Trust Company.
Apr. 25, 1961	Filed plaintiff's motion for Judgment on the Pleadings and certificate of service.
May 8, 1961	Filed Notice of Appearance of Lisman & Lisman, Esqs. for defendant Cutting & Trimming, Inc.

DOCKET ENTRIES

May 8, 1961	Filed Answer of Defendant Cutting & Trimming, Inc.
June 16, 1961	Filed Motion for Judgment on the Pleadings and Certificate of Service.
June 16, 1961	Filed Motion for Order of Service Under 28 U.S.C. sec. 1655 and Certificate of Service.
June 28, 1961	Filed Consent of defendant Cutting & Trimming, Inc. to motion for Order of service as to Rainbow Children's Dress Company.
July 7, 1961	Hearing on motion for order of service under T28 U.S.C., Sec. 1655 as to Rainbow Children's Dress Company U. S. Atty. and Asst. U. S. Atty. for plaintiff.
July 7, 1961	Ordered: Motion granted.
July 14, 1961	Filed Affidavit in Support of motion for order for service by publication.
July 17, 1961	Filed Order re appearance on or before 9-5-61, as to Rainbow Children's Dress Co. Delivered copies to Marshal for service.
Sept. 7, 1961	Filed Proof of Publication.
Sept. 14, 1961	Filed Marshal's Return on Publication of Notice.
Nov. 8, 1961	Filed Stipulation for continuance to Feb. Term, 1962.
Nov. 9, 1961	Filed Order granting stipulation for con- [fol. 3] tinuance to Feb. 1962 Term. Mailed copies to Attys. of record.
Dec. 16, 1961	Filed plaintiff's Motion for Leave to Amend Complaint, and Certificate of Service.
Dec. 18, 1961	Filed Order granting leave to amend complaint. Mailed copy to Attys.
Mar. 3, 1962	Filed Notice of Appearance of Charles J. Adams, Esq., Attorney General, and Charles E. Gibson, Jr., Esq., Deputy Attorney General, for defendant State of Vermont.
Mar. 3, 1962	Filed Defendant State of Vermont's Motion for Leave to Amend Answer and Certificate of Service.

DOCKET ENTRIES

Mar.	8, 1962	Filed State of Vermont's Motion for Leave to Amend Answer, and Certificate of Service.
Mar.	9, 1962	Hearing on motions to amend answer of defendant State of Vermont. John H. Carnahan, Esq., Asst. U. S. Atty., and John G. Penn, Esq., for Government, Louis Lisman, Esq. for defendant Cutting & Trimming, Inc., George R. McKee, Esq. for defendant Chittenden Trust Company, Charles E. Gibson, Esq., Deputy Atty. Gen., for defendant State of Vermont.
Mar.	9, 1962	Ordered: Both motions to amend answer of defendant State of Vermont granted.
Mar.	9, 1962	Hearing on motions for Judgment on the pleadings against defendants Cutting & Trimming, Inc. and State of Vermont.
Mar.	9, 1962	Mr. Penn for Government; Mr. Gibson for defendant State of Vermont; Mr. Lisman for defendant Cutting & Trimming, Inc.; and Mr. McKee for defendant Chittenden Trust Company, argue to the Court.

[fol. 4]

Mar.	9, 1962	Taken under advisement. State of Vermont has until the first of next week to furnish the Court a memo.
Apr.	5, 1962	Filed Plaintiff's Interrogatories to defendant, Cutting & Trimming, Inc. and Certificate of Service.
June	6, 1962	Filed Judgment order as to Disposition of sum of $1,878.82 held by Chittenden Trust Company of Burlington.—to State of Vt. $1,628.15, secondly, as far as possible, to State of Vt. for interest on $1,628.15 from 10-21-58 to date; thirdly, as far as possible payment of any balance to United States. Copy mailed to attorneys.

DOCKET ENTRIES

June 15, 1962	Filed Final judgment pursuant to rule 54 (b) of the Federal rules of Civil procedure, as to Defendants State of Vermont and Chittenden Trust Company of Burlington. Mailed copy to attorneys.
June 16, 1962	Filed Notice of Appeal. Mailed copy to U. S. Atty., John G. Penn, George R. McKee, Lisman & Lisman, Halperin, Morris, Granett & Cowan, Charles J. Adams and Charles E. Gibson, Jr.
June 16, 1962	Filed Motion to stay execution pending appeal. Certificate of Service.
June 18, 1962	Filed Order to stay execution pending appeal.
July 19, 1962	Filed Motion to extend time for filing record and docketing appeal and Order thereon. Mailed copy to attys.
July 23, 1962	Filed Motion to extend time for filing record and docketing appeal, and order extending time to 9-14-62. Mailed copy to Attys.

[fol. 5]

Sept. 7, 1962	Mailed record on Appeal to Clerk, U. S. Court of Appeals, N. Y., N. Y.
Sept. 18, 1962	Filed Answer to plaintiff's interrogatories.
Sept. 18, 1962	Mailed Supplemental Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit.

In United States District Court

Complaint—Filed March 10, 1961

The United States of America, by its attorney, Louis G. Whitcomb, United States Attorney for the District of Vermont, for its complaint herein respectfully alleges and shows:

I

This action has been requested by the Commissioner of Internal Revenue who is a delegate of the Secretary of the Treasury of the United States and is brought under direction of the Attorney General of the United States.

II

Jurisdiction of this action is conferred upon this Court by Sections 7401, 7402(a), and 7403 of Title 26, United States Code and Sections 1340 and 1345 of Title 28, United States Code.

III

This is a civil action arising under the Internal Revenue Code of the United States where the United States seeks to foreclose tax liens.

IV

The United States of America is now and was at all times herein mentioned a corporation sovereign and body politic.

V

Defendant Cutting & Trimming, Inc., is a duly organized and licensed corporation doing business within the jurisdiction of this Court.

VI

[fol. 6] Defendant Chittenden Trust Company of Burlington maintains an office and is authorized to do and is doing business within the jurisdiction of this Court.

VII

On information and belief, defendant Rainbow Children's Dress Co., is a corporation licensed to do business in New York.

VIII

Defendant State of Vermont is a corporation sovereign and body politic within the jurisdiction of this Court.

IX

On information and belief, on each of some twenty days during the calendar year 1958, each of said days having been in a different calendar week, the total number of persons employed by said Cutting & Trimming, Inc., for some portion of the day was four or more and to each of whom wages were paid by said corporation. By reason of such employment and payment of wages, on February 6, 1959, an assessment of $5,360.71 was made on behalf of the plaintiff (otherwise known as taxes under the Federal Unemployment Tax Act). Interest in the amount of $5.25 was included in said assessment, making a total assessment of $5,365.96. On or about February 10, 1959, notice of said assessment was given to and demand was made upon said Cutting & Trimming, Inc., for payment of the amount thereof. $54.31 of said assessment has been paid and there remains due and owing $5,311.65.

X

On information and belief, on each of twenty days during the calendar year 1959, each of said days having been in a different calendar week, the total number of persons employed by said Cutting & Trimming, Inc., for some portion of the day was four or more and to each of whom wages were paid by said corporation. By reason of such employment and payment of wages, on June 9, 1959, a jeopardy assessment of $381.13 was made on behalf of [fol. 7] the plaintiff (otherwise known as taxes under the Federal Unemployment Tax Act). On or about June 9, 1959, notice of said jeopardy assessment was given to and demand made upon said Cutting & Trimming, Inc., for payment of the amount thereof. No part of said assessment has been paid.

XI

During all times from and including April 1, 1959, to and including May 30, 1959, Cutting & Trimming, Inc.,

employed diverse persons to each of whom wages were paid by them on account of such employment; and because of said employment and payment of wages, the District Director of Internal Revenue at Burlington, Vermont, made a jeopardy assessment of the amounts of the percentage of the wages to have been deducted and withheld by said Cutting & Trimming, Inc., from such wages as taxes upon the income of such employees (otherwise known as withholding taxes). Notice of said assessment was given on behalf of the plaintiff to and demand for payment of the amount thereof was made upon said Cutting & Trimming, Inc. The amount of taxes, the date thereof, the date of said notice and demand, any payment made on said assessment and the date thereof, any abatement made on said assessment and the date thereof, and the balance due of said assessment are set out opposite the taxable period for which made, as follows:

Taxable Period	Tax	Jeopardy Assessment Date	Date of Notice & Demand	Payments	Abatement	Balance Due
April 1, 1959 through May 30, 1959	$10,971.70	6/9/59	6/9/59	$4,289.08 6/9/59 $ 126.81 7/16/59	$27.85 10/15/59	$6,527.96

XII

On information and belief, the defendant Chittenden Trust Company of Burlington has personal property in its possession belonging to defendant, Cutting & Trimming, Inc., namely, the sum of $1,878.82.

XIII

[fol. 8] It is alleged on information and belief that defendants, Chittenden Trust Company of Burlington, Rainbow Children's Dress Co. of New York, and the State of Vermont claim some right, title, or interest to the personal property described in paragraph XII herein.

Wherefore, the United States of America prays:

1. That each of the defendants be summoned and required to answer this complaint and set forth specifically such right, title, or interest each may have in the personal property described in paragraph 12 herein.

2. That it be adjudged and decreed that the defendant Cutting & Trimming, Inc., is indebted to the United States

of America in the sum of $12,220.74 plus interest as provided by law.

3. That the Court find and decree that the United States of America has a valid and subsisting lien on all property of Cutting & Trimming, Inc., in the possession of Chittenden Trust Company for the amount of the tax liability and that said liens is prior and paramount to the claims of any and all parties to this proceeding.

4. That the Court issue an order directing the Chittenden Trust Company to surrender to the plaintiff, United States of America, as much of Cutting & Trimming, Inc.'s property in Chittenden Trust Company's possession as is necessary to satisfy plaintiff's lien.

5. That if upon final determination of this cause there remains unsatisfied any part of the amount of said tax liability, that the plaintiff have and recover judgment against the defendant Cutting & Trimming, Inc., for the amount thereof.

6. That the Court grants such other, further and different relief as the Court deems just and proper.

s/Louis G. Whitcomb, United States Attorney.

[fol. 9] IN UNITED STATES DISTRICT COURT

ANSWER OF THE DEFENDANT, STATE OF VERMONT—Filed April 4, 1961

Now comes the State of Vermont by Thomas M. Debevoise, its Attorney General and makes answer to the plaintiff's Complaint as follows:

I

The defendant, State of Vermont, has no knowledge with respect to the allegation in Paragraph One of the Plaintiff's Complaint and leaves the plaintiff to its proof.

II

The defendant, State of Vermont, admits the jurisdiction of the Court.

III

The defendant, State of Vermont, admits the nature of the action except that it does not admit that the United States has an enforceable tax lien as against it, the State of Vermont.

IV

The defendant, State of Vermont, admits the allegations of Paragraph Four.

V

The defendant, State of Vermont, admits the allegation in Paragraph Five.

VI

The defendant, State of Vermont, admits the allegations in Paragraph Six.

VII

The defendant, State of Vermont, has no information with respect to the allegations in Paragraph Seven and leaves the plaintiff to its proof.

VIII

[fol. 10] The defendant, State of Vermont, admits the allegations in Paragraph Eight.

IX

The defendant, State of Vermont, has no information with respect to the allegations in Paragraph Nine of the plaintiff's Complaint and leaves the plaintiff to its proof thereof, except that it denies that the assessment therein alleged, if such there was, is effective as against the State of Vermont with respect to the sum of money held by the defendant, Chittenden Trust Company, mentioned in Paragraph Twelve of the plaintiff's Complaint.

X

The defendant, State of Vermont, has no information with respect to the matters alleged in Paragraph Ten of the plaintiff's Complaint and leaves the plaintiff to its proof thereon, except that it denies that the assessment

therein alleged was effective in any way against the defendant, State of Vermont, with respect to the sum of money held by the defendant, Chittenden Trust Company, as specified in Paragraph Twelve of the plaintiff's Complaint.

XI.

The defendant, State of Vermont, has no knowledge with respect to the allegations made in Paragraph Eleven of the Plaintiff's Complaint and leaves the plaintiff to its proof thereof, except that it denies that the assessments therein mentioned are in any way effective as against the State of Vermont with respect to the sum of money held by the Chittenden Trust Company as said sum is mentioned in Paragraph Twelve of the plaintiff's Complaint.

XII

The defendant, State of Vermont, admits that the defendant, Chittenden Trust Company of Burlington, Vermont, has personal property in its possession in the amount of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82), but denies that the said sum [fol. 11] belongs to the defendant, Cutting & Trimming, Inc., but to the contrary, is now the property of the State of Vermont.

XIII

The defendant, State of Vermont, is without information with respect to the claims of the defendants, Chittenden Trust Company of Burlington and Rainbow Children's Dress Co. of New York, and leaves the plaintiff to its proof with respect to same and admits that the State of Vermont does claim right, title and interest in and to the personal property described in Paragraph Twelve of the plaintiff's Complaint. The defendant, State of Vermont, alleges that under date of May 21, 1959, it commenced suit against the said defendant, Cutting & Trimming, Inc. in the Chittenden County Court, a court of general jurisdiction in the County of Chittenden and State of Vermont, and that the Chittenden Trust Company, a Vermont banking corporation was joined in said suit as trustee of said Cutting & Trimming, Inc.; that said defendants, Cutting & Trimming, Inc. and Chittenden

Trust Company were duly served and proper return made in said suit to the Chittenden County Court; that the Chittenden Trust Company entered its appearance in said action and disclosure was made, by which it showed that it held the sum of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82) as trustee of said Cutting & Trimming, Inc. and therein agreed to answer to the said Chittenden County Court with respect to said sum of money as the Court Order directed; that on October 23, 1959, Judgment was entered by said Chittenden County Court in behalf of the plaintiff, State of Vermont, against the said defendant, Cutting & Trimming, Inc., in the amount of Four Thousand and Forty-nine Dollars and Twenty-two Cents ($4,049.22) and against the said defendant, Chittenden Trust Company, in the amount of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82) and that a Judgment Order was duly issued on said entry; that the Chittenden Trust Company held said sum of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two cents ($1,278.82) [fol. 12] since the service of the said writ of the State of Vermont upon it and still holds said sum of money against the right of the State of Vermont; that said Judgment Order remains in full, unsatisfied.

Wherefore, the Defendant, State of Vermont, Prays:

1. That the Complaint of the Plaintiff, United States of America, be dismissed as to it, the said State of Vermont.

2. That it be adjudged and decreed that the sum of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82) held by the defendant, Chittenden Trust Company, of right belongs to the said State of Vermont as against the claim of all other parties to this suit.

3. That the Court issue an Order directing the Chittenden Trust Company to surrender and pay over to the State of Vermont, in satisfaction of the Judgment Order herein before set forth, the said sum of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82).

4. That the Court grant such other and further relief

to the defendant, State of Vermont, as the Court deems just and proper.

Dated at Montpelier in the County of Washington and State of Vermont, this 31st day of March, A. D. 1961.

s/Thomas M. Debevoise, Attorney General for the State of Vermont.

[fol. 13] Certificate of Service (omitted in printing)

NOTICE OF APPEARANCE

To the Clerk of the above named Court:

We hereby enter our appearance for the State of Vermont in the above-entitled action.

s/Thomas M. Debevoise, Attorney General, Montpelier, Vermont. s/John D. Paterson, Deputy Attorney General, Montpelier, Vermont.

IN UNITED STATES DISTRICT COURT

ANSWER OF THE DEFENDANT, CHITTENDEN TRUST COMPANY—Filed April 5, 1961

Now comes the Chittenden Trust Company, defendant in the above entitled cause, by George R. McKee, Esquire, of Burlington, Vermont, its attorney, and makes answer to the Complaint filed in said cause as follows:

1. The defendant, Chittenden Trust Company, for answer [fol. 14] alleges it has insufficient knowledge or information respecting allegations set forth in Paragraphs I, III, V, VII, IX, X, XI, of said Complaint and therefore leaves the plaintiff to its proof.

2. The defendant for answer to allegations II, IV, VI, VIII admits the same.

3. The defendant for answer to allegation XII in said Complaint admits it has in its possession the sum of $1,878.82 which personal property it has at all times been ready and willing to pay to the party legally entitled to the same and has held it in its possession for the reason that the money had been attached by three claimants, to wit: Rainbow Children's Dresses, the State of Vermont and the United States Government, arising from the following processes:

(a) Rainbow Children's Dress Company vs. Cutting & Trimming, Inc. and Chittenden Trust Company, trustee, served on said Bank Feb. 20, 1959, as a result of which said Trustee disclosed on Feb. 24, 1959 it had in its hands $600.00 belonging to said Cutting & Trimming, Inc.

(b) Writ served on said Trustee on May 25, 1959 by the State of Vermont, as a result of which disclosure was made to Chittenden County Court on May 27, 1959 that said bank had in its hands money due defendant in the amount of $1,278.82.

(c) On June 2, 1959, a Federal Tax Lien and Levy was served on said Trustee against Cutting & Trimming, Inc., as a result of which said bank disclosed it had in its hands the sum of $1,278.82 and recited the disclosure of said amount having been made to the Court in State of Vermont vs. Cutting & Trimming, Inc. and said bank by attachment heretofore.

The total amount of said money in its possession is as aforesaid, $1,878.82.

4. The defendant, Chittenden Trust Company for answer [fol. 15] to allegation XII of said Complaint says that it holds in its possession the sum of $1,878.82 and has been at all times and is ready and willing to make payment to one of the three aforesaid parties hereinafter set forth as claimants, to wit: Rainbow Children's Dress Company, the State of Vermont, and the United States of America and said bank disclaims any title in said funds other than as Trustee of same and shall make payment to whichever party the said Court in this cause shall determine is entitled to receive the same.

5. The defendant, Chittenden Trust Company, for answer further says that upon determination by the Court of the issues claimed in said Complaint, it shall abide by such order as may issue from the Court in its determination to whom the said funds belong and upon payment of the same as directed by the Court shall be relieved and held harmless from any liability in the payment of same.

6. That the Court grant such other further relief as the Court deems just and proper.

Dated at Burlington, Vermont, this 31st day of March A.D. 1961.

Chittenden Trust Company, by Geo. R. McKee, Its Attorney.

Certificate of Service (Omitted in printing)

[fol. 16] NOTICE OF APPEARANCE

To the Clerk of the above named Court:

I hereby enter my appearance for the Chittenden Trust Company in the above-entitled action.

s/Geo. R. McKee, Esquire, 138 Church Street, Burlington, Vermont.

IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed April 25, 1961

Comes now the United States of America, plaintiff in the above-entitled cause, by its attorney, Louis G. Whitcomb, United States Attorney for the District of Vermont, and respectfully moves the Court to enter judgment on the pleadings in favor of the plaintiff herein as prayed for in the complaint against the defendant, State of Vermont, on

the ground that plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

s/Louis G. Whitcomb, United States Attorney.

[fol. 17] In United States District Court

Answer of Defendant, Cutting & Trimming, Inc.—Filed May 8, 1961

1. The said defendant admits the allegations of Paragraphs I, II, III, IV, V, VI, VII, and VIII of the Plaintiff's Complaint.

2. The said defendant denies the allegations of Paragraphs IX, X, and XI of the Complaint, except the allegation of the making of an assessment against said defendant. Further answering, said defendant admits that it is obligated to the plaintiff but denies the amount of the obligation to be as stated in the said assessment or in the said Complaint. Said defendant also admits that the plaintiff is entitled to the fund in the Chittenden Trust Company.

3. The said defendant admits the allegations of Paragraphs XII and XIII of said Complaint.

By: s/Louis Lisman.

Attorneys for Defendant Cutting & Trimming, Inc.: Lisman & Lisman, 191 College Street, Burlington, Vermont. Halperin, Morris, Grannett & Cowan, 1740 Broadway, New York 19, New York.

[fol. 18] In United States District Court

Motion for Judgment on the Pleadings—Filed June 16, 1961

Now comes the United States of America, plaintiff in this civil action, by its attorney, Joseph F. Radigan, United States Attorney for the District of Vermont, and respectfully moves the Court to enter judgment on the

pleadings in favor of the plaintiff as prayed for in the complaint against defendant Cutting and Trimming, Inc., on the ground that the plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

Joseph F. Radigan, United States Attorney. By: s/Joseph E. Frank, Assistant United States Attorney.

In United States District Court

Motion for Leave to Amend Complaint—Filed Dec. 16, 1961

Comes now the United States of America, plaintiff in the above-entitled cause, by its attorney, Joseph F. Radigan, United States Attorney for the District of Vermont, and respectfully moves for leave of the Court to amend its complaint by adding at the end of paragraph IX of the complaint, the following sentence:

"Notice of Lien was filed on or about June 2, 1959 with the City Clerk, Burlington, Vermont, as provided by law."

The grounds for this motion is that the additional sen- [fol. 19] tence was omitted in the complaint and is relevant, material and essential in order for there to be a fair adjudication of this case.

s/Joseph F. Radigan, United States Attorney.

In United States District Court

Order Granting Leave to Amend—Filed Dec. 18, 1961

Now, on this 18 day of Dec., 1961, plaintiff, United States of America, appearing by its attorney, Joseph F. Radigan, and plaintiff asks leave to amend its complaint by adding to paragraph IX of the complaint the sentence, "Notice of Lien was filed on or about June 2, 1961 with

the City Clerk, Burlington, Vermont, as provided by law," and the Court being fully advised in the premises, grants leave to plaintiff to amend its complaint as prayed.

s/Ernest W. Gibson, United States District Judge.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, STATE OF VERMONT, FOR LEAVE TO AMEND ANSWER—Filed Mar. 3, 1962

Now comes the State of Vermont, a defendant in the above-entitled cause, by its Deputy Attorney General Charles E. Gibson, Jr., and respectfully moves for leave of the Court to amend its Answer by adding at the end of paragraph 13 of the Answer the following language:

[fol. 20] "That the aforesaid suit was brought after certain assessments and demands were made upon the defendant in said suit and after certain liens were filed, all as set forth hereafter.

On October 21, 1958, assessment and demand was made on the defendant, Cutting & Trimming, Inc., for withholding taxes for the third quarter, 1958, in the amount of $1,628.15, and on October 30, 1958, a notice of lien for said taxes was filed in the City Clerk's Office, Burlington, Vermont, as provided by law and recorded in Volume 13, Page 306.

On February 7, 1959, assessment and demand was made against the defendant, Cutting & Trimming, Inc., for withholding taxes for the fourth quarter, 1958, taxes due being in the amount of $964.08, with penalty, interest and costs as provided by law coming to $1,023.40, and a notice of lien was filed in the latter amount for said taxes in the City Clerk's Office, Burlington, Vermont, on February 13, 1959, and recorded in Book 13, Page 336.

The grounds for this motion is that the additional sentence was omitted in the Answer and is relevant, material and essential in order for there to be a fair adjudication of this case.

Sate of Vermont By s/Charles E. Gibson, Jr., Deputy Attorney General.

March 2, 1962.

[fol. 21] IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, STATE OF VERMONT FOR LEAVE TO AMEND ANSWER—Filed March 8, 1962

Now comes the State of Vermont, a defendant in the above-entitled cause, by its Deputy Attorney General Charles E. Gibson, Jr., and respectfully moves for leave of the Court to amend the Answer by adding at the end of paragraph 13 the following language:

"That the aforesaid assessments were made on the basis of a quarterly withholding tax return filed on October 21, 1958, by the defendant, Cutting and Trimming, Inc., with the Vermont Tax Department, said return reporting that the amount of $1,628.15 was withheld by Cutting and Trimming, Inc., from the wages of its employees for the third quarter 1958 and a withholding tax return filed on February 7, 1959, by the defendant, Cutting and Trimming, Inc., had withheld from the wages of its employees for the fourth quarter 1958 the amount of $964.08. The defendant, Cutting and Trimming, Inc., failed to pay the amounts for which it was liable to the State of Vermont as set forth in its withholding returns aforesaid, assessments and demands were made as indicated heretofore and suit was brought on the State of Vermont to enforce its tax liens."

The grounds for this motion is that the additional language was omitted in the Answer and is relevant, material and essential in order for there to be a fair adjudication of this case.

State of Vermont, By Charles E. Gibson, Jr., Deputy Attorney General.

March 7, 1962.

[fol. 22] IN UNITED STATES DISTRICT COURT

JUDGMENT ORDER AS TO DISPOSITION OF SUM OF $1,878.82 HELD BY CHITTENDEN TRUST COMPANY OF BURLINGTON—Filed June 6, 1962

The United States, seeking to foreclose its tax liens, filed this action against the taxpayer, Cutting & Trimming, Inc. It named as party defendants, Chittenden Trust Company, Rainbow Children's Dress Co., and the State of Vermont. Defendant Rainbow Children's Dress Co. went out of business sometime in 1961, and has entered no appearance in this action. The background facts essential to this particular problem may be simply stated. Defendant, Chittenden Trust Company, has possession of the sum of $1,878.82, which was deposited with it by the defendant, Cutting & Trimming. To enforce its liens on this sum of money, the plaintiff has moved for judgment on the pleadings. That the plaintiff is entitled to the bank deposit is admitted by all of the defendants except the State of Vermont. The State of Vermont has opposed the motion insofar as it claims a prior right to a portion of the money held on deposit by the Trust Company, and in its answer to the complaint, the State has set up a prayer for a decree stating its prior right.

There is no dispute about the remaining facts. On October 21, 1958, the State of Vermont made an assessment and demand on defendant Cutting & Trimming for $1,628.15 for state withholding taxes it then claimed due for the third quarter of 1958. The State filed notice of lien on October 30, 1958, pursuant to 32 V.S.A. Sec. 5765. The federal Commissioner of Internal Revenue made an assessment on the taxpayer, Cutting & Trimming, amounting to $5,365.96 on February 9, 1959. This assessment was for taxes arising in the year 1958 under the Federal Un-[fol. 23] employment Tax Act. Notice of lien was filed by the Commissioner on June 2, 1959, pursuant to 26 U.S.C.A. Sec. 6323. There were other assessments and notices of lien by both the State and the United States, but it is not necessary to consider them here. It is necessary to note only that the first lien of the State of Vermont was filed in October of 1958, and the first lien of the federal government was filed in June of 1959. The priority of right to the

money held by the Trust Company must be determined according to the relative priority of these liens.

Before examining the liens in question here, it should be noted that the State instituted a suit against Cutting & Trimming in a Vermont state court on May 21, 1959, joining the Chittenden Trust Company as trustee. Judgment for the State for the taxes owing by Cutting & Trimming was rendered on October 23, 1959. Realizing that it can claim no priority as a judgment creditor over the earlier lien of the United States the State now relies entirely on its status as a holder of lien for taxes.

The record discloses no insolvency on the part of the taxpayer, Cutting & Trimming. The Federal Priority Statute, R.S. Sec. 3466, 31 U.S.C.A. Sec. 191, therefore is not applicable here. The United States relies upon its position as holder of a lien created by Sec. 6321 of Title 26, U.S.C.A. This statute does not confer priority upon the federal liens so created. Sec. 6322 of the same title states when the lien shall arise, and how long it shall last. Sec. 6323 of the same title sets out the validity of the lien as it relates to certain classes of persons (none of which is applicable in this case), and the filing and notice requirements. The United States then has two methods of enforcing the tax lien. Section 6331-6344 of Title 26, U.S.C.A. provide for the seizure of property for collection of taxes. Section 6331 in particular refers to levy and distraint upon all property of the defaulting taxpayer on which, in one instance, there is a lien for the payment of taxes. The second enforcement method is found in Section 7403 of Title 26, U.S.C.A., which provides for enforcement of the lien by civil action. That provision is the basis for the action now before this Court.

[fol. 24] The State of Vermont in turn relies upon its position as holder of a lien created by Section 5765 of Title 32, V.S.A. This statute is applicable only in cases of employers, and in connection with nonpayment of withholding taxes. Otherwise, it is an identical state counterpart of the federal lien provisions in 26 U.S.C.A. Section 6321, 6322 and 6323.[1] The state enforcement provision

---

[1] 32 V.S.A. Section 5765. Amount of withheld taxes as lien against employer.

If any employer required to deduct and withhold a tax

is also similar to that in the federal statutes. By reference to the Vermont chattel mortgage statute,[2] the tax lien foreclosure provision incorporates the remedy of either public sale by a public officer, or foreclosure by a bill in equity. [fol. 25] The determination of priority of the competing liens in this case is governed by federal law. *United States* v. *Brosnan*, 363 U.S. 237, 80 S. Ct. 1108, 4 L.Ed. 2d 1192 (1960); *Aquilino* v. *United States*, 363 U.S. 509, 80 S.Ct. 1277, 1285, 4 L.Ed. 2d 1365, 1371 (1960). Further, the determination of this Court is to be guided by the principles outlined by the Supreme Court in *United States* v. *City of New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520 (1954). Indeed,

---

under section 5761 of this title neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town, gore, or grant, in the office of the clerk of the county wherein such property is situated. In the case of any prior mortgage on real or personal property so written as to secure a present debt and also future advances by the mortgagee to the mortgagor, the lien herein provided, when notice thereof has been filed in the proper clerk's office, shall be subject to such prior mortgage unless the commissioner of taxes also notifies the mortgagee of the recording of such lien in writing, in which case any indebtedness thereafter created from mortgagor to mortgagee shall be junior to the lien herein provided for.

[2] V.S.A. Section 5767, the foreclosure provision, refers to Sections 1791-1797 of Title 9, V.S.A.

both the State and the United States rely entirely on the *New Britain* case. Thus it is important to examine that case carefully in connection with the matter at hand. An enlightening study of *New Britain* is found in an article by Professor Frank Kennedy[3] in which he examines the development of federal tax lien priority from *Spokane County* v. *United States*, 279 U.S. 80, 49 S. Ct. 321, 73 L.Ed. 621 (1929) to *United States* v. *City of New Britain, supra.* However, since that article was written, the Supreme Court has found the federal tax lien to be superior to competing liens in several cases.[4] This might well alter some conclusions gained from the article. No case has dealt with a tax lien as here asserted by the State of Vermont. These more recent cases, therefore do not alter this Court's conclusions about *New Britain*, as it particularly relates to the present action.

Statutory liens must be unquestionably complete to overcome the federal tax lien priority. This is most obvious in [fol. 26] the cases just cited. The test established by the *New Britain* case, at page 84, is that the "priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate." Choate, as defined in Webster's New International Dictionary, 2nd Ed., 1952, means complete. It comes from the word inchoate, derivative of the Latin, *incohare*, which means to begin or to initiate. As used in connection with liens, as indicated by the rulings of the Supreme Court,

---

[3] Frank P. Kennedy: *The Relative Priority of the Federal Government: The Fernicious Career of the Inchoate and General Lien.* 63 Yale L.J. 905 (1954).

[4] *United States* v. *Acri*, 348 U.S. 211, 75 S.Ct. 239, 99 L.Ed. 264 (1955); *United States* v. *Liverpool & London & Globe Ins. Co.*, 348 U.S. 215, 75 S.Ct. 247, 99 L.Ed. 268 (1955); *United States* v. *Scovil*, 348 U.S. 218, 75 S.Ct 244, 99 L.Ed. 271 (1955); *United States* v. *Colotta*, 350 U.S. 808, 76 S.Ct. 82, 100 L.Ed. 725 (1955); *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, 76 S.Ct. 646, 100 L.Ed. 871 (1956); *United States* v. *R. F. Ball Construction Co.*, 355 U.S. 587, 78 S.Ct. 442, 2 L.Ed. 2d 510 (1958).

it means that not only must a lien be more than initiated, it means that all steps must be taken that will insure that the lien will not be lost. In some cases, it has meant that the lienor must bring suit and obtain judgment. See particularly in this respect the dissent by Mr. Justice Douglas in *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, 76 S.Ct. 646, 100 L.Ed. 871 (1956). Another word is used in the *New Britain* case in connection with the requirements of a successfully competing lien, i.e. "perfected." Perfection in the sense used means that "there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States* v. *City of New Britain, supra,* at page 84.

Here is the nub of the whole matter in this case. Of the federal tax lien created by Section 6321, the Supreme Court said in the *New Britain* case, again at 84, "The federal tax liens are general and, in the sense above indicated, perfected." The Court referred to the use of the word perfected as set out above. There is no question that the federal tax lien is considered a choate and perfected lien upon all of the property of the taxpayer when properly filed according to Section 6323. And there is no question that the lien of the United States attached to the property of Cuttings & Trimming, including the money deposited in the Chittenden Trust Company, at the time the assessment was made. The same must be true of the tax lien of the State of Vermont, as created and given force by identical statutory language. Compare *Ersa, Inc.* v. *Dudley,* 234 F2d 178 (CCA 3rd Cir., 1956) where a Pennsylvania state tax lien was characterized by the Pennsylvania courts [fol. 27] as not attaching to personal property until a writ of *fieri facias* was issued on a judgment entered on the lien. In that case, the federal tax lien prevailed where it was filed after the state tax lien was filed, but before the writ of *fieri facias* had been issued.

I cannot agree with the contention of the United States that the *New Britain* case establishes a requirement of specificity that defeats the State's lien in this case. While the terms "general" and "specific," and in particular the combination of "general and inchoate lien," are used by

the courts in discussing competing liens,[5] this factor is not a controlling one here.[6]

Indeed the federal tax lien is a general lien, and this fact does not deprive it of validity or effectiveness. *United States* v. *City of New Britain, supra; United States* v. *City of Greenville,* 118 F2d 963, 965 (CCA 4th Cir. 1941). Moreover, the factors that are significant to the tax liens in this case are stated by the Supreme Court in *New Britain,* and as set out above, are the factors of perfection and choateness, or completeness. These are the factors that are also discussed in the cases both before and after *New Britain.* In *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47, 71 S.Ct. 111, 95 L.Ed. 53 (1950), Mr. Justice Minton's opinion applies its attention to the contingencies involved with the competing attachment lien, and the fact that it was not perfected or complete. Essentially the same concern is revealed in the *Acri, Scovil,* and *Liverpool & London* cases, all of which relied upon the *Security Trust* case. See footnote 4, *supra.*

To proceed then, the amount of the State's lien is established; the State is identified as the lienor; and [fol. 28] the property subject to the lien, even though it is personal property rather than realty, is identified. Further, nothing remains to be done except to enforce the lien. It is in no way contingent, nor a "caveat of a more perfect lien to come."[7] In many instances, the State has only to have a public sale of the property covered by its tax lien. If judicial assistance is sought, as by a bill in equity, there is no uncertainty as to the outcome of this method of enforcement which would raise any question of complete-

---

[5] Mr. Justice Douglas uses this phrase in his dissent in *White Bear Brewing Co.* case, cited in note 4, supra.

[6] That a lien is general rather than specific is particularly significant when it must compete with the tax lien in a situation where the insolvency priority statute is applicable. *United States* v. *Gilbert Associates,* 345 U.S. 361, 366, 73 S.Ct. 701, 97 L.Ed. 1071 (1953); cf. Mr. Justice Whittaker's discussion in note 4 at page 252 in *James* v. *United States,* 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961).

[7] *United States* v. *Scovil, supra,* at 220.

ness.[8] In other words, we are not dealing here with a private creditor who holds a garnishment, attachment or similar statutory lien, and who may or may not be successful in necessary future litigation against his debtor. We are dealing with the competing tax liens of two sovereigns. The State of Vermont must secure adequate public revenue to sustain its public burdens, as must the United States. In order to secure public revenue, tax lien legislation has become necessary. The State is in no way prohibited from making use in its State statute of federal statutory language that has proved effective. The tax lien of the State, then, as created by this statutory language, is fully choate and perfected, as is the tax lien of the United States. Cf. *Gower* v. *State Tax Commissioner*, 207 Or. 288, 295 P2d 162 (1956). To find otherwise would be giving the respective statutory provisions nothing less than a spurious construction and would create an unjustifiable double standard.

The whole concept of the Vermont Graduated Income Tax Law was that such law should be based entirely on the Federal Internal Revenue Code. This was the recommendation that the Governor of Vermont made in his inaugural address in January, 1947. See Vermont Senate Journal Biennial Session 1947, p. 709, 725. The bill that was passed by the Vermont Legislature and approved April 26, 1947 followed that basic concept completely. See No. 15 Public Acts 1947. Section 17 of that Act declared its purpose to be, in addition to that of raising revenue, to have the [fol. 29] Vermont Graduated Income Tax Law conform as closely as may be with the Internal Revenue Code et al. Indeed, Chapter 151 of Title 32, V.S.A. entitled Income and Franchise Taxes, starts out with this same statement of purpose—that which was originally adopted in 1947.

The 1947 legislature did not see fit to follow the Governor's recommendation to institute a complete system of employers withholding of State Income taxes but this was adopted by the 1949 legislature. See Act No. 26, Public Acts of 1949, approved May 13, 1949. Thus, complete em-

---

[8] *United States* v. *Acri*, *supra*; *United States* v. *Liverpool & London & Globe Ins. Co.*, *supra*.

ployers withholding has been part of the Vermont Income Tax law ever since. Then, in 1953, the Legislature of Vermont took another logical step. By Act No. 265 of Public Acts of 1953, approved June 4, 1953, it adopted the lien imposing provisions used by the State in its levy of October 21, 1958.

In passing this Act, as in all its other existing income tax laws, the legislature conformed as closely as may be with the Internal Revenue Code by using the exact language found in Sections 6321-23 of the Internal Revenue Code—the sections that were used by the United States in imposing its lien of February 9, 1959.

To hold that the State cannot do what the United States can do under statutes using identical language simply doesn't make sense.

While the Supreme Court has been persistent in maintaining the protection and superiority of the tax liens of the federal government, its ruling in the *New Britain* case, in this Court's view, does not direct the result contended for here by the United States. The priority of these statutory liens is, then, "determined by another principle of law, namely, 'the first in time is the first in right'." *United States* v. *City of New Britain, supra,* at 85; cf. *Commercial Credit Corporation* v. *Schwartz,* 130 F. Supp 524 (D.C.Ark., 1955), and *United States* v. *Williams,* 139 F. Supp 94 (D.C. N.Car., 1956). The lien of the State of Vermont was the first in time, it is therefore the first in right.

[fol. 30] This lien is for taxes, as stated at the outset, in the amount of $1,628.15. The State, therefore, has a right to receive that amount, plus interest from the date of assessment and demand, from the Chittenden Trust Company, to the extent of the funds held on deposit for Cutting & Trimming.

It is hereby Ordered that the Chittenden Trust Company disburse the money held by it on deposit for Cutting & Trimming, Inc. in the following manner:

1) Payment first shall be made to the State of Vermont in the amount of $1,628.15.
2) Secondly, as far as possible, payment shall be made to the State of Vermont for interest on $1,628.15, computed from October 21, 1958 to date.

3) Thirdly, as far as possible, payment of any balance shall be made to the United States of America.

It is further Ordered that upon such payment the Chittenden Trust Company shall then be released from all liability in this matter and is discharged as a defendant in this case.

Ernest W. Gibson, United States District Judge.

Done at Brattleboro, District of Vermont, this 6 day of June, 1962.

Endorsed: Filed June 6, 1962.

Arnold A. Murray, Clerk.

[fol. 31] IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, AS TO DEFENDANTS STATE OF VERMONT AND CHITTENDEN TRUST COMPANY OF BURLINGTON—Filed, June 15, 1962

Whereas, upon consideration of plaintiff's motion for judgment on the pleadings against State of Vermont and Chittenden Trust Company of Burlington, an opinion and judgment order was rendered by this Court on June 6, 1962; and

Whereas, all claims of the plaintiff arising in this particular action against the State of Vermont and the Chittenden Trust Company were determined by that order; and

Whereas, there is no just reason for delay in directing a final judgment as to the State of Vermont and the Chittenden Trust Company in this matter, while rights and liabilities of the United States and the defendant Cutting & Trimming, Inc. remain for adjudication;

It is therefore ordered pursuant to Rule 54(b) F.R.C.P. that the judgment order of this Court dated June 6, 1962,

is a final judgment in this action as to the Chittenden Trust Company of Burlington and the State of Vermont.

Ernest W. Gibson, United States District Judge.

Done at Brattleboro, in the District of Vermont, this 15th day of June, 1962.

Endorsed: Filed June 15, 1962.

Arnold A. Murray, Clerk.

[fol. 32] In United States District Court

Notice of Appeal—Filed, June 16, 1952

Notice is hereby given that the United States of America, plaintiff, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment Order as to Disposition of Sum of $1,878.82 held by Chittenden Trust Company of Burlington, entered June 6, 1962, and made final under Rule 54(b) by order entered June 15, 1962.

Joseph F. Radigan, United States Attorney. By: John H. Carnahan, John H. Carnahan, Assistant United States Attorney.

Address: Federal Building, Rutland, Vermont.

Endorsed: Filed June 16, 1962.

Arnold A. Murray, Clerk.

In United States District Court

Order to Stay Execution Pending Appeal—Filed, June 18, 1962

On motion of the United States Attorney, counsel for the Plaintiff herein;

It is ordered that execution of the Judgment Order as to Disposition of Sum of $1,878.82 Held by Chittenden Trust

[fol. 33] Company of Burlington, entered herein on June 6, 1962, and made final under Rule 54(b) as to defendants State of Vermont and Chittenden Trust Company by order dated June 15, 1962, be and it is suspended pending appeal.

Dated at Brattleboro, in the District of Vermont, this 18 day of June, 1962.

Ernest W. Gibson, United States District Judge.

Filed June 18, 1962.

[fol. 34] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 272—October Term, 1962

Argued April 11, 1963

Docket No. 27779

UNITED STATES OF AMERICA, Appellant,

v.

THE STATE OF VERMONT; CUTTING & TRIMMING, INC.; CHITTENDEN TRUST COMPANY OF BURLINGTON; RAINBOW CHILDREN'S DRESS COMPANY OF NEW YORK, Appellees.

OPINION—May 9, 1963

Before: Moore, Friendly and Hays, Circuit Judges.

Appeal by the United States from a judgment of the District Court for Vermont, Ernest W. Gibson, Judge, 206 F. Supp. 951, upholding the priority of a lien of the State of Vermont for state withholding taxes over a subsequent lien of the United States for taxes under the Federal Unemployment Tax Act. Affirmed.

Joseph Kovner (Louis F. Oberdorfer, Assistant Attorney General, Lee A. Jackson, Fred E. Youngman, Attorneys) (Joseph F. Radigan, United

States Attorney, John H. Carnahan, Assistant United States Attorney, on brief), for United States of America.

[fol. 35] Charles E. Gibson, Jr., Attorney General, Montpelier, Vermont, for the State of Vermont.

FRIENDLY, *Circuit Judge:*

This case raises a question in the vexed field of federal tax lien priority not squarely ruled by any of the numerous decisions of the Supreme Court. It involves a conflict between a state tax assessment, definite in amount, which became a lien on all of a taxpayer's property but did not relate to specific assets, and a later federal tax assessment with precisely the same attributes, in a situation to which the federal priority-in-insolvency statute, R. S. § 3466, now codified in 31 U. S. C. § 191, is not in terms applicable. The District Court for Vermont upheld the priority of the state tax lien, 206 F. Supp. 951. We agree.

The circumstances giving rise to the controversy are these:

The Vermont statutes provide, 32 V. S. A. § 5765, that if an employer who is required to deduct and withhold a tax from an employee's wages fails to pay the same after demand, "the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer," and further that "Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable." The lien becomes valid "as against any subsequent mortgagee, pledgee, purchaser or judgment creditor" once notice is filed with the clerk of the town, city or, in some instances, county where the property is situated. On October 21, 1958, [fol. 36] Vermont made an assessment and demand on Cutting & Trimming, Inc. for $1,628.15 for withholding taxes due for the third quarter of 1958; it filed notice of lien on October 30 with the city clerk of Burlington. On May 21,

1959, it instituted suit in a state court against Cutting & Trimming, Inc., and joined Chittenden Trust Co., a Burlington bank, as a defendant. In consequence of a writ served on May 25, Chittenden Trust Co. disclosed that it had in hand $1,278.82 owing to Cutting & Trimming plus another $600 previously attached by Rainbow Children's Dress Company. On October 23, 1959, judgment was entered for Vermont against Cutting & Trimming for $4,049.22—this including other assessments not here relevant—and against Chittenden Trust Co. for $1,278.82.

Meanwhile, on February 9, 1959, the Commissioner of Internal Revenue made an assessment of $5,365.96 against Cutting & Trimming for 1958 taxes under the Federal Unemployment Tax Act. Under §§ 6321 and 6322 of the Internal Revenue Code of 1954, this amount thereupon became "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." On June 2, 1959, notice of lien was filed pursuant to § 6323 of the Code.

Later, in 1961, the United States brought this action against Cutting & Trimming, Chittenden Trust Co., the State of Vermont, and Rainbow Children's Dress Company, to establish the indebtedness of Cutting & Trimming for taxes in a larger amount than the February 9, 1959, assessment, and to foreclose its lien against the property of Cutting & Trimming held by the trust company ahead of Vermont's lien. Vermont's answer alleged that its lien had priority as a result of the October 21, 1958, assessment.[1] [fol. 37] On cross-motions for judgment on the pleadings, the District Court decreed that Chittenden Trust Co. apply the $1,878.52 held by it first to the principal and then to the interest of Vermont's lien, with any balance payable to the United States, and directed, under F. R. Civ. Proc. 54(b), that this be a final judgment as to the trust company and the state.

---

[1] Vermont does not, and could not, rely on its status as a judgment creditor under the October 23, 1959, judgment in the state court, since notice of the federal lien had been filed prior to that time. See 26 U. S. C. § 6323 (§ 3672 of Internal Revenue Code of 1939).

In defending against the appeal of the United States from this judgment, Vermont relies on the principle that, at least as between liens of the same sort, the first in time is the first in right. It emphasizes that its lien, which predated the federal lien, was in every other material respect identical to it. The state lien, like the federal, attaches to "all property and rights to property, whether real or personal, belonging to" the taxpayer, arises "at the time the assessment * * * is made," and is valid once notice has been filed as against any subsequent "mortgagee, pledgee, purchaser, or judgment creditor." 32 V. S. A. § 5765; 26 U. S. C. §§ 6321-6323. The *verbatim* similarity is not a coincidence; as Judge Gibson pointed out, 206 F. Supp. at 956, the Vermont legislation was avowedly modeled on the Internal Revenue Code. Enforcement also is similar; Vermont, like the federal government, could have enforced its lien on the fund here at issue either by a civil action in the courts or by direct seizure and public sale.[2]

---

[2] Section 7403 of the Internal Revenue Code provides for enforcement of a federal tax lien by civil action; §§ 6331-6344 provide for seizure and sale. Although Judge Gibson did not fully develop the statutory basis for his statement that public sale as well as civil action would be an available means of enforcing Vermont's lien, 206 F. Supp. at 953, see also 955, the proposition seems entirely sound. In 1958, when this case arose, the controlling provision was 32 V. S. A. § 5767, which states that "The lien provided for by section 5765 of this title may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages." While the provisions relating to foreclosure of mortgages on real estate apparently allow this to be done only by bill or petition in equity, see 12 V. S. A. §§ 4521 *et seq.*, chattel mortgages can be foreclosed as well by direct public sale, 9 V. S. A. §§ 1793-1797; hence that remedy would have been available here as to the money held by the bank.

In 1959 Vermont strengthened these provisions by en-

[fol. 38] Against this the United States argues that the first in time principle is inapplicable because (1) decisions of the Supreme Court have established that the federal lien would prime Vermont's if Cutting & Trimming had been insolvent so that the federal priority-in-insolvency statute, 31 U. S. C. § 191 (former R. S. § 3466), would have come into play, and (2) the same principle should be—or at any rate has been—applied when the Government relies only on the tax lien statutes, §§ 6321-23 of the Internal Revenue Code.

The Government's first proposition is beyond successful challenge. In cases governed by R. S. § 3466, the Supreme Court has upheld the priority of United States tax claims against an Illinois tax lien, arising prior to Government's, which we find indistinguishable from Vermont's here, *Illinois* v. *Campbell*, 329 U. S. 362, 370-76 (1946), and even against an antecedent lien for state property taxes assessed upon certain machinery owned by the taxpayer, *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361 (1953). It is the Government's second proposition that is debatable.

Considering the two statutes solely on the basis of their language and purpose, we find nothing that calls for identical results and much that leads to different ones. R. S. [fol. 39] § 3466, which goes back to 1796, 1 Stat. 515, says, in the strongest possible terms, that "Whenever any person indebted to the United States is insolvent • • • the debts due to the United States shall be first satisfied." In cases to which it applies, it gives this prime position to all "debts due to the United States," whether liens or not; the only issue in such cases is how far the words of the statute should be restricted by withdrawing from their sweep property of the insolvent upon which a rival claimant has

---

acting 32 V. S. A. § 5763, which makes applicable to the employers' withholding tax here involved "the provisions • • • of chapter 155 of this title." Those provisions include 32 V. S. A. § 6067, which provides that "When a tax • • • is not paid within sixty days after the same becomes due, the commissioner shall issue a warrant • • • to the sheriff • • • commanding him to levy upon and sell the real and personal property of the taxpayer • • •."

secured a "lien".[3] It is in this connection that the Supreme Court has developed the rule that a lien contesting against the priority of the United States cannot escape the literal impact of R. S. § 3466 unless at "the crucial time" it was "definite, and not merely ascertainable in the future by taking further steps," as to the identity of the lienor, the amount of the lien, and the property to which it attaches, *Illinois* v. *Campbell, supra*, 329 U. S. at 375; whether a lien passing even this severe test will in fact escape the breadth of R. S. § 3466, the Court has not decided. *Spokane County* v. *United States*, 279 U. S. 80 (1929); *New York* v. *Maclay*, 288 U. S. 290 (1933); *United States* v. *Texas*, 314 U. S. 480 (1941); *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U. S. 353 (1945); *Illinois* v. *Campbell, supra*; *United States* v. *Gilbert Associates, Inc., supra*; see Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L. J., 905, 911-19 (1954). In contrast, the federal tax lien statutes, which trace their ancestry to 1865, 13 Stat. 470-71, and were re-enacted for the first time in 1866, 14 Stat. 107, have remained silent for nearly a century on the very issue as to which R. S. § 3466 has spoken so clearly since the earliest [fol. 40] days; they say nothing to create a priority for tax liens of the United States over similar but earlier tax liens of the states or municipalities. This silence of the lawmakers of 1865-66 becomes more eloquent when the language of the tax lien statutes is contrasted with the Bankruptcy Act of 1867, 14 Stat. 517, 531, passed by the same Congress that had re-enacted the former legislation and by many of the same Congressmen who had passed it originally. Section 28 of the Bankruptcy Act gave priority, immediately after administration expenses, to "All debts due to the United States, and all taxes and assessments under the laws thereof", these being ranked ahead of "All debts due to the State in which the proceedings in bankruptcy

---

[3] If the rival claimant has attained the status of "mortgagee, pledgee, purchaser, or judgment creditor," he then prevails, under 26 U. S. C. § 6323 (formerly § 3672 of the 1939 Code), against even an antecedent federal tax lien, if notice thereof has not been previously filed.

are pending, and all taxes and assessments made under the laws of such State." Thus, when the Congress of those days wished to prefer the federal government, it knew how to say so.[4] Furthermore, it was not until *United States* v. *Security Trust & Savs. Bank, infra,* decided in 1950, that Congress could have had any reason to suppose that what it had failed to say with respect to priority in the tax lien legislation of the 1860's would be supplied for it by judicial construction.

With this background, one would think it fairly plain that when a tax lien of the United States encounters a state tax lien of precisely the same nature, the case would be governed by the "cardinal rule" laid down by Chief Justice Marshall in *Rankin & Schotzell* v. *Scott,* 12 Wheat. (25 U. S.) 177, 179 (1827):

> [fol. 41] "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant."

Arguing against this, the Government tells us that "In the collection of its revenue the Federal Government must necessarily have supremacy over the states (and the numerous local tax authorities deriving their power from those states)," since "the Federal Government is not in a position * * * to match the timing of the innumerable state and local tax liabilities." Whatever force such an argu-

---

[4] See also § 5004(a)(1) of the Internal Revenue Code of 1954. This statute, which provides explicitly that the federal lien for taxes on distilled spirits shall be a "first lien" on the property to which it attaches, was first enacted in 1868, 15 Stat. 125. The enactment afforded protection to prior lienors whose liens would thereby be outranked by requiring that waivers of their priority be obtained before a distiller could obtain the performance bond necessary for legal entry into the distilling business. 15 Stat. 128, § 5177 (b)(2) of the Internal Revenue Code of 1954.

ment might or might not have with Congressmen, who after all are not without some local allegiances, the Government points to nothing in the language or history of the tax lien statutes to show that Congress entertained the purpose thus attributed to it. Moreover, the change in the priority provisions of the Bankruptcy Act made in 1898, 30 Stat. 563, and continued to this day, § 64, 11 U. S. C. § 104, whereby claims of states and their subdivisions, even when they have not become liens at the critical date, were elevated to the same rank as similar tax claims of the United States, casts doubt on the existence of the policy here claimed.

The Government quite rightly reminds us that, however all this may be, we are not reading from a clean slate but from one that bears copious writing by the Supreme Court. This begins, for present purposes, with *United States* v. *Security Trust & Savs. Bank*, 340 U. S. 47 (1950)—a case in which, as has been pointed out, the Court was "without [fol. 42] benefit of a brief for the respondent."[5] The decision, which established priority of the federal tax lien over that arising from an attachment under a California statute permitting a plaintiff to attach the property of a defendant at any time "as security for the satisfaction of any judgment that may be recovered", is plainly distinguishable from the instant case. Although the attachment had preceded the date of the federal lien, judgment had not, and the Supreme Court of California itself had said that "The attaching creditor obtains only a potential right or a contingent lien * * * ", which, depending on the eventualities of his lawsuit, might never come into effect; the rule of "first in time, first in right" surely need not be read so broadly as to permit a state to place someone in the "first" position by resort to the fictional doctrine of "relation back." But Mr. Justice Minton went on to say:

> "In cases involving a kindred matter, i.e., the federal priority under Rev. Stat. § 3466, it has never been held sufficient to defeat the federal priority

---

[5] Brown, The Supreme Court 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77, 84 n. 37 (1958).

> merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. [Citing Illinois v. Campbell, *supra.*] If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here."

To us this falls considerably short of saying, as the Government asserts, that the entire body of law holding that certain liens had not reached the level required to raise the [fol. 43] question whether they might overcome the priority expressly accorded the United States by R. S. § 3466, was transplanted to the federal tax lien statutes which by their terms accorded none. We read it as saying only that, just as the § 3466 priority could not be overcome by a state's baptizing as a lien something which in fact was "merely a lis pendens notice that a right to perfect a lien exists", 340 U. S. at 50, the rights of the federal government under the tax lien statutes likewise could not be.

That Mr. Justice Minton did not mean to say in *Security Trust* what the Government says he did, was made quite clear four years later in *United States* v. *New Britain,* 347 U. S. 81 (1954). There, in upholding the liens of city real estate taxes and water rents insofar as these had attached before the federal tax assessments, he sharply distinguished the situation where "the debtor is insolvent" and hence "all the property of the debtor is involved," in which case "Congress has expressly given priority to the payment of indebtedness owing the United States * * * by § 3466 of the Revised Statutes" from the situation "where the debtor is not insolvent", in which case "Congress has failed to expressly provide for federal priority, * * * although the United States is free to pursue the whole of the debtor's property wherever situated." *Id.* at 85.[6] In the latter

---

[6] The Court's next sentence, "The State, having a lien only upon property within its boundaries, may not reach beyond the state line to fasten its lien upon other prop-

situation, the Court held, "priority of these statutory liens [fol. 44] is determined by another principle of law, namely, 'the first in time is the first in right'." *Ibid.*[7]

Indeed, *New Britain* would unquestionably decide this case in favor of Vermont but for one circumstance, the crucial character of which the Government contends to have

---

erty," may be thought to run exactly counter to the Government's contention, noted above, that the tax collection problems of the United States require a reading of the tax lien statutes that would prefer its liens to similar but earlier state or local tax liens.

[7] The *New Britain* decision would seem to have definitively rejected one argument, not advanced in this Court, that would sustain the Government's position here. This is the view, taken by Mr. Justice Jackson's concurring opinion in *Security Trust*, 340 U. S. at 51, that the statute which is now § 6323 of the Internal Revenue Code of 1954 and was formerly § 3672 of the 1939 Code, see note 3 *supra*, by protecting the rights of mortgagees, pledgees, purchasers, and judgment creditors whose interests arise even after the federal tax lien where the latter has not been recorded, has the effect of subordinating all lienors who cannot bring themselves within one of those four categories even though their liens arise prior to the federal tax lien. The legislative history and purpose of the statute make the argument quit untenable, as is pointed out by Professor Brown in the comment cited in note 5 *supra*, 72 Harv. L. Rev. at 84-85 & n. 39, and as Mr. Justice Jackson himself, by concurring in the Court's opinion in *New Britain*, apparently later recognized. The argument was heavily pressed upon the Court by the Government in *New Britain*, see its Brief at 6-7, 13, 22-24, and its Reply Brief at 7, but was demolished by Professor Kennedy as counsel for New Britain. See Supplemental Brief for Respondent at 10 n. 16, 11-12, 13-14. The Court's decision in favor of the city's prior liens must be taken to have rejected it, since Mr. Justice Minton's opinion for the Court in *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361 (1953), makes clear that *New Britain* could not have been considered a "judgment creditor" within the terms of former § 3672, and there was no other way in which the city could bring itself within that section.

been recognized in *New Britain* itself. This is that the city liens for taxes and water rents that were there preferred over the federal tax liens "attached to specific pieces of real property." 347 U. S. at 84. We thus are confronted with the not uncommon question whether, when the Supreme Court has mentioned a factor as one of several leading to a decision, this is to be regarded as critical. Cf. *Larios* v. *Victory Carriers, Inc.*, — F.2d —, — (2 Cir. 1963). Illumination on that issue here is shed by another portion of the *New Britain* opinion dealing with the city's contention that [fol. 45] the specific nature of its liens, as against the general nature of the Government's, gave it priority even for liens attaching *after* the federal tax assessments. The Court rejected this claim on the basis that "the priority of each statutory lien contested here must depend on the time it attached to the property in question and become choate," 347 U. S. at 86, and that the prior federal tax liens, although general, were "choate" as soon as they attached. It would seem that if the general federal tax lien under §§ 6321 and 6322 is thus sufficiently "choate" to prevail over a later specific local tax lien, a general state tax lien under an almost identically worded statute must also be "choate" enough to prime a later and equally general federal tax lien under Chief Justice Marshall's "cardinal rule" of "first in time, first in right", in the absence of contrary direction by Congress. So Judge Parker said in dictum in *United States* v. *Greenville*, 118 F. 2d 963, 966 (4 Cir. 1941), a case cited with apparent approval in *New Britain*, 347 U. S. at 84.

The Government also presses upon us post-*New Britain* decisions of the Supreme Court under the tax lien statutes. Of these, only *United States* v. *Buffalo Savings Bank*, 371 U. S. 228 (1963), concerns rival liens arising from tax assessments of a state or municipality, and it adds nothing relevant to the instant case, since the local liens there, like the city liens held junior in *New Britain*, attached subsequent to the assessment of the federal taxes. *United States* v. *Acri*, 348 U. S. 211 (1955) (attachment lien prior to judgment), and *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215 (1955) (garnishment lien prior to judgment), were similar to *Security Trust* and are distinguishable from the instant case on the same basis that it is.

In *United States* v. *Scovil*, 348 U. S. 218 (1955), the federal taxes were assessed and had become liens before the land-[fol. 46] lord's distress warrant issued; only the notice of the federal liens postdated the warrant, and the Court held that the lien created by such a warrant was not a mortgage, pledge, judgment or purchase under § 3672 of the 1939 Code, corresponding to § 6323 of the 1954 Code. See notes 3 and 7, *supra*. In *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587 (1958), decided *per curiam* by a 5-4 vote, the subcontractor's surety whose claim to priority was denied had rested its case on its alleged status as a mortgagee under § 3672 of the 1939 Code. This was also the claim espoused by the four dissenting Justices, who referred to § 3672 as "the statute here conceded by the parties to be controlling." 355 U. S. at 589-90. We see no reason to suppose that the case stands for anything more than a denial of this claim. But if it were to be read as having also decided that, apart from § 3672, the surety enjoyed no priority on the basis of "first in time, first in right" because its lien was not "choate," or if such a view is thought to have been a factor in the Court's decision that the surety's interest did not come within § 3672, the case can be distinguished here. For such a decision may well have turned on the fact that, as appears from the opinion of the District Court, 140 F. Supp. 60 (W. D. Texas), aff'd 239 F. 2d 384 (5 Cir. 1956), and the record, the surety's claim, based on an assignment made by the subcontractor in consideration for a performance bond covering a construction job in Texas, was for liabilities incurred on the subcontractor's behalf in connection with a completely different job in Louisville, Kentucky; the bond for this other job was not executed until nearly nine months after the assignment of funds to become due to the subcontractor on the Texas job, and the liabilities for which the surety was seeking to recover out of these funds had not yet arisen at the time the federal tax liens arose. See 4 Corbin, Contracts (1962 pocket part), at 147, n. 72; *United States* v. [fol. 47] *L. R. Foy Construction Co.*, 300 F. 2d 207 (10 Cir. 1962). The distinction would, indeed, be more satisfying if the federal tax assessment had preceded the making of the Louisville contract and not merely the accrual of losses

thereunder, but there is nothing to indicate that the Court focused on this point.

There remain[8] a series of mechanics' lien cases, all upholding priority of the federal tax lien and all decided by *per curiam* reversal on petition for certiorari: *United States* v. *Colotta*, 350 U. S. 808 (1955); *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010 (1956); *United States* v. *Vorreiter*, 355 U. S. 15 (1957); and *United States* v. *Hulley*, 358 U. S. 66 (1958). See also *United States* v. *Kings County Iron Works, Inc.*, 224 F. 2d 232 (2 Cir. 1955). The *Vorreiter* case occasions no difficulty since, as appears from the report in 134 Col. 543, 307 P. 2d 475, 476 (1957), the federal tax lien arose, though it was not yet recorded, before the contracts giving rise to the mechanics' liens were made. Neither does the *Hulley* case since, as appears from the Government's petition for certiorari (in which is printed the unreported opinion of the Florida Circuit Court for Pinellas County), the United States tax assessment lists had been received by the District Director, and the federal tax liens had thus attached, on December 2, 1952 and January 7, 1954, long before the beginning of the construction work on March 11, 1955. In *Colotta*, the work had been completed before the federal assessment, 224 Miss. 33, 79 So. 2d 474, 475 (1955), but the decision, made on the Government's unopposed petition for certiorari over the dissent of Mr. Justice Douglas, may have turned on the fact that the holders of the me-
[fol. 48] chanics' liens had neither recorded their contracts under § 359 nor filed the *lis pendens* notice provided for by § 380 of the Mississippi Code before the federal lien arose, nor had they taken any steps to enforce their liens by bringing suit and obtaining judgment. In *White Bear*, which drew a dissenting opinion from Mr. Justice Douglas joined by Mr. Justice Harlan, the mechanics' lien, although recorded, likewise had not been reduced to judgment when the federal taxes were assessed. See 227 F. 2d at 361.

---

[8] We are aware also of *Aquilino* v. *United States*, 363 U. S. 509 (1960); *United States* v. *Durham Lumber Co.*, 363 U. S. 522 (1960); and *Crest Finance Co.* v. *United States*, 368 U. S. 347 (1961), but do not consider them relevant here.

Apparently, as suggested by Judge Haynsworth, dissenting in *United States* v. *Bond*, 279 F. 2d 837, 849 (4 Cir.), cert. denied, 364 U. S. 895 (1950),[9] the Supreme Court views a mechanic's lien, even if "duly filed and recorded and presently in the process of being foreclosed," as simply "an interim step in the lienor's progress toward the status of a judgment creditor and the foreclosure of all possible defenses to his claim," and thus as analogous to "the lien product of provisional remedies," such as those in *Security Trust, Acri, and Liverpool & London*. See Mr. Justice Douglas' dissent in *White Bear*, 350 U. S. at 1011. Whether or not this is the right explanation of *Colotta* and *White Bear*, and whether or not we might agree with Judge Haynsworth as to the equity of the doctrine in cases where the federal tax assessment, or even the notice thereof, postdates the construction work, see 279 F. 2d at 849 n. 8, we do not regard those decisions as controlling the case of a lien arising from a state or local tax assessment. Although such an assessment does not make the taxing body a "judgment creditor" within § 6323 of the Code, *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361 [fol. 49] (1953), see note 7 *supra*, it goes considerably further along that road than a mechanics' lien, which arises out of a private contractual arrangement and to which the taxpayer may have all sorts of defenses. At least this is true where, as here, the state or local government is no more required than is the United States to resort to the courts to enforce its due. See note 2 *supra*. As the Supreme Court said in *Bull* v. *United States*, 295 U. S. 247, 260 (1935), "The assessment is given the force of a judgment, and if the amount assessed is not paid when due,

---

[9] The actual decision in that case is not relevant to our problem: it held that the portion of *New Britain* upholding the priority of federal tax assessments over subsequently accruing local tax liens was not rendered inapplicable because the taxes were paid by a mortgagee whose mortgage, having priority over the federal taxes by virtue of § 6323 of the Internal Revenue Code (former § 3672), covered such taxes. *Accord, United States* v. *Buffalo Savings Bank, supra*, 371 U. S. 228.

administrative officials may seize the debtor's property to satisfy the debt." This distinction seems to us the only way to reconcile the *Colotta* and particularly the *White Bear per curiams,* subordinating a mechanc's lien, earlier and on specific property, to the lien of a federal tax assessment, later and general, with the *New Britain* opinion which prefers a local tax lien on specific property to a later general federal tax lien but prefers the latter to a subsequent specific local tax lien.[10] Doubtless we shall soon be instructed if we are wrong.[11]

Affirmed.

---

[10] A possible argument against reconciliation on this basis is that although New Britain's lien for real estate taxes could be enforced by levy and sale, 1949 Conn. Gen. Stats. § 1853 (1960 C. G. S. §12-172), its lien for water rents could be enforced only by judicial foreclosure. 1949 Conn. Gen. Stats. §§ 758, 1863 (1960 C. G. S. §§ 7-239, 12-181). But the Government's Brief before the Supreme Court took no note of this distinction and, on the contrary, stated that both types of liens could be enforced summarily. P. 9 n. 2, p. 27 n. 13. Although a reference in the Reply Brief indicates that the Government may have become aware of the distinction, p. 5 n. 2, this hardly sufficed to disabuse the Court of the earlier concession (Brief, p. 27 n. 13) that both liens "may be enforced by levy and sale." See also Reply Brief, pp. 12-13.

[11] We recognize that in certain of the post-*New Britain* decisions under the tax lien statutes the Supreme Court has, for one purpose or another, cited cases under R. S. § 3466. See *United States* v. *Acri*, 348 U. S. at 213; *United States* v. *Scovil*, 348 U. S. at 220. But we would think it wrong to take such citations as overcoming the considered statement in *New Britain* as to the distinction between the two statutes.

[fols. 50-51] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

CUTTING & TRIMMING, INC., CHITTENDEN TRUST COMPANY OF BURLINGTON, ET AL., Defendants-Appellees.

JUDGMENT—May 9, 1963

Appeal from the United States District Court for the District of Vermont

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fols. 52-54] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title Omitted]

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME—July 1, 1963

Now comes the United States, by its attorneys, and respectively moves for leave to file a petition for rehearing out of time on the ground that this Court should reconsider its decision issued on May 9, 1963, in light of the decision of the United States Supreme Court in *United States* v. *Pioneer American Insurance Co.*, issued June 10, 1963, or 17 days after expiration of the time for filing a petition for rehearing, pursuant to Rule 25 of this Court. A copy of the petition for rehearing and of the

opinion in *United States* v. *Pioneer American Insurance Co.* is attached hereto.

Dated: July 1, 1963.

Louis F. Oberdorfer, W.R. Assistant Attorney General, Counsel for the Appellant.

Joseph F. Radigan, United States Attorney. John H. Carnahan, Assistant United States Attorney.

[fols. 55-59] IN THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER GRANTING MOTION TO FILE PETITION FOR REHEARING OUT OF TIME—July 3, 1963

A motion having been made herein by counsel for the appellant for leave to file the petition for rehearing out of time.

Upon consideration thereof, it is

Ordered that the said motion be and it hereby is granted.

A. Daniel Fusaro, Clerk. by Vincent A. Carlin, Chief Deputy Clerk.

[fol. 60] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 27779

UNITED STATES OF AMERICA, Appellant,

v.

CUTTING & TRIMMING, INC.; CHITTENDEN TRUST COMPANY OF BURLINGTON; RAINBOW CHILDREN'S DRESS COMPANY OF NEW YORK; THE STATE OF VERMONT, Appellees

On Appeal from the Judgment of the United States District Court for the District of Vermont

APPELLANT'S PETITION FOR REHEARING—Filed July 3, 1963

[fol. 61] *To the Honorable United States Court of Appeals for the Second Circuit and the Honorable Leonard P. Moore, Henry J. Friendly and Paul R. Hays, Circuit Judges thereof:*

Now comes the United States, by its attorneys, and respectfully petitions for a rehearing in this matter on the ground that the decision in this Court herein is inconsistent with the decision of the United States Supreme Court in *United States* v. *Pioneer American Insurance Co.*, decided June 10, 1963, which is reprinted in the Appendix hereto.

We think this Court's decision herein rests upon its holding that "the entire body of law holding that certain liens had not reached the level required to raise the question whether they might overcome the priority expressly accorded the United States by R. S. Sec. 3466"—or the full choate lien doctrine—was not transplanted to the federal tax lien statutes. Moreover, this Court rejected the Government's argument that in *United States* v. *New Britain*, 347 U. S. 81, the United States Supreme Court applied the test of a choate lien laid down in the Section 3466, Revised Statutes, cases, *i.e.*, that the lien must be definite, and not merely ascertainable in the future by taking further steps, as to the identity

of the lienor, the amount of the lien, and the property to which it attaches, to determine the priority of a state tax lien competing with the federal tax lien, absent insolvency. *Pioneer American* is, of course, distinguishable on its facts since it did not involve a state tax lien, but rather, the foreclosure fee of attorneys for a prior mortgagee, which, though provided for in the note and mortgage, was not fixed in amount until after recordation of the federal tax lien. Nevertheless, the *Pioneer American* opinion seems to us to resolve the basic premise upon which this Court has decided the instant case. In our reading, the *Pioneer American* opinion seems clearly to hold that the "entire body" of choate lien law developed in connection with Section 3466, Revised Statutes, was transplanted to the federal tax lien statutes and that, absent insolvency, a federal tax lien cannot be defeated except by a prior choate lien, *i.e.*, a lien, definite as to the identity of the lienor, the amount of the lien, and the property to which it attaches. It further seems to us expressly to say that the choate lien test was applied in *New Britain*. Thus, *Pioneer American* states:

> As for a lien created by state law, its priority depends " on the time it attaches to the property and [fol. 62] becomes choate." *United States* v. *New Britain, supra,* at 86; *United States* v. *Security Tr. & Sav. Bank,* 340 U. S. 47. Choate state-created liens take priority over later federal tax liens, *United States* v. *New Britain, supra; Crest Finance Co.* v. *United States,* 368 U. S. 347, while inchoate liens do not. See *United States* v. *Liverpool & London Ins. Co.,* 348 U. S. 215; *United States* v. *Scovill,* 348 U. S. 218; *United States* v. *Colotta,* 350 U. S. 808. And it is a matter of federal law when such a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising of later-filed federal tax lien. "Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." *United States* v. *New Britain, supra,* at 86. The federal rule is that liens are perfected in the sense that there is nothing more to be done

to have a choate lien . . . . when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *Id.*, at 84.

We submit that the state tax lien in question here was not perfected when the federal lien arose, because though first assessed, no action had been taken by the State to attach its general lien to the specific property of the taxpayer, a bank account, claimed by the federal tax lien. The State's tax was not a choate lien within the test laid down by *Illinois* v. *Campbell*, 329 U. S. 362; *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290; and *United States* v. *Texas*, 314 U. S. 480. Viewed in the light of *Pioneer American*, the critical factor in *New Britain* would seem to be that the local real estate tax liens there involved "attached to specific pieces of real property." (347 U. S., p. 84.) In the same light, *United States* v. *City of Greenville*, 118 F. 2d 963 (C. A. 4th), does not equate a general state tax lien with the federal tax lien, but rather holds that the general federal tax lien is as specific as the lien for local real estate taxes and improvement assessments on specific pieces of real property. As the opinion points out (p. 966), it was not necessary for the tax lien statute to provide, as does Section 3466, that the federal tax be first paid. It was enough that the federal tax lien is specific and perfected in fact and law. The choate lien [fol. 63] doctrine is neither mysterious nor pernicious; it rests upon the basic proposition that in order to assure the collection of federal revenue against competing claims, the tax lien created therefor by Congress is deemed to be fully perfected and specific as to all property and rights to property of a taxpayer. A competing lien cannot be rendered specific or perfected by a general declaration in a contract or a state statute; it must be so in fact, measured by federal standards. Thus, *City of Greenville*, like *New Britain*, discloses that the connection between the priority of the federal tax lien and the federal right to first payment under Section 3466 is supplied by the choate lien test; a competing lien does not raise any exception from Section 3466 unless it is choate, and it cannot compete with the federal tax lien on the basis of first-in-time, first-in-right, unless it is choate.

Pioneer American emphasizes that the three-strand choate lien test cannot be unraveled, in its restatement of *United States* v. *Ball Construction Co.*, 355 U. S. 587, rehearing denied, 356 U. S. 934, as "applying the choateness test to those seeking the protection of Section 6323 (a)." Hence, it follows that *United States* v. *Scovil*, 342 U. S. 218, was not decided on the ground that a landlord's lien is not entitled to the protection of recordation, but rather on the ground that the landlord's lien there was not choate. Accordingly, the landlord's claim in *Scovil*, a tax lien case, stands on the same footing as in *United States* v. *Waddill Co.*, 323 U. S. 353, a Section 3466 case, defeated in both cases because it was not choate. Finally, *Pioneer's* coupling of *New Britain* with *United States* v. *Security Tr. & Sav. Bank*, 340 U. S. 47; *Crest Finance Co.* v. *United States*, 368 U. S. 347; *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215, and especially *United States* v. *Colotta*, 350 U. S. 808, suggests that the choate lien test is to be applied without distinction as to state tax liens, attachment and garnishment liens, factors' liens and mechanics' liens.

The assessment of a state tax giving rise to a general lien may supply two elements of a choate lien—the identity of the lienor and the amount of the lien—but it does not supply the third equally important element, the definiteness of the property to which the lien attaches. For the purposes of Section 3466 and the tax lien provisions of the Internal Revenue Code, a general state tax lien is not specific and perfected, but only a "*caveat* of a more perfect lien to come." *New York* v. *Maclay*, 288 U. S. 290, 294.

[fol. 64] For the foregoing reasons, it is respectfully requested, in the light of *Pioneer American*, that the petition for rehearing be granted and that the cause be set down for reargument at such time as this Court may deem proper.

Respectfully submitted, Louis F. Oberdorfer, Assistant Attorney General. Lee A. Jackson, Joseph Kovner, Attorneys, Department of Justice, Washington 25, D. C.

Joseph F. Radigan, United States Attorney. John H. Carnahan, Assistant United States Attorney.

June, 1963.

[fol. 65] APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1962

UNITED STATES, Petitioner,

v.

PIONEER AMERICAN INSURANCE COMPANY ET AL.

On Writ of Certiorari to the Supreme Court of Arkansas

June 10, 1963

Mr. Justice White delivered the opinion of the Court.

The United States has sought review of a decision of the Supreme Court of Arkansas subordinating the federal tax lien (26 U. S. C. § 6321) to a lien for attorney's fees included in an antecedent mortgage contract. Because of conflict between the Arkansas decision and *United States* v. *Bond*, 279 F. 2d 837 (C. A. 4th Cir.); *In re New Haven Clock & Watch Co.*, 253 F. 2d 577 (C. A. 2d Cir.), we granted certiorari. 371 U. S. 909.

When the taxpayers in 1958 acquired their interest in the parcel of real estate involved here, they assumed liability on a note and the deed of trust (first mortgage) securing it, which were held by respondent Pioneer American Insurance Company. The note obligated taxpayers "in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's [fol. 66] fee."[1] The taxpayers at the same time executed a

[1] The deed of trust provided, in addition:
"That if either party of the second part [trustee] or the party of the first part [mortgagor] shall become a party to any suit or proceeding at law or in equity in reference to its interest in the premises herein conveyed, the reasonable costs, charges and attorney's fees in such suit or proceeding shall be added to the principal sum then owing by the party of the first part and shall be secured by this

note and second mortgage to their vendor, respondent. The Development Company, and subsequently, in April 1960, the real estate became burdened again with a mechanic's lien in favor of Alfred J. Anderson.

In October of 1960, taxpayers defaulted on the first mortgage monthly installment and failed thereafter to meet payments as they fell due. On March 24, 1961, Pioneer American filed a suit to foreclose its mortgage and sought, in addition to the principal and interest, a reasonable attorney's fee. The United States was named a party defendant because of two outstanding federal tax liens against the taxpayers which were filed on November 29, 1960, and January 30, 1961. The United States admitted its liens were subordinate to the principal and interest on the first and second mortgages but claimed that the liens were superior to the claim for attorney's fee. Three additional federal tax liens subsequently were filed on April 14, July 17, and October 3, 1961.[2]

---

instrument and the note secured hereby shall, at the option of the holder, become due and collectible."

. . . . . .

"The proceeds of any sale under this deed of trust shall be applied . . . as follows:

"First: To pay the costs and expenses of executing this trust, and any and all sums expended on account of costs of litigation, attorney's fees, ground rents, taxes, insurance premiums, or any advances made or expenses incurred on account of the property sold, with interest thereon.

"Second: To retain as compensation, a commission as set forth by the laws of the State of Arkansas.

"Third: To pay off the debt secured hereby, including accrued interest thereon, as well as any other sums owing . . . . pursuant to this instrument."

[2] The federal tax liens, as of the date of the order of distribution, November 15, 1961, were as follows:

Lien of November 29, 1960	$ 659.67
Lien of January 30, 1961	1,661.03
Lien of April 14, 1961	1,344.69
Lien of July 17, 1961	1,653.23
Lien of October 3, 1961	1,164.04

On November 15, 1961, the Chancery Court entered its de-
[fol. 67] cree of foreclosure which fixed the attorney's fee at $1,250 and determined the priority of the various claimants. After satisfaction of court and foreclosure sale costs, Pioneer American was accorded first priority for principal, interest and the attorney's fee; The Development Company took next on principal and interest under the second mortgage; Alfred J. Anderson shared thereafter on his mechanic's lien and the United States took last. The property was sold and proceeds were received which satisfied all claims except $3,615.28 of the federal tax liens.[3] The United States appealed to the Supreme Court of Arkansas asserting that it was entitled to priority over the attorney's fee,[4] and that $1,250 more should have been applied to reduce the unpaid federal taxes.[5] With one judge dissenting the Arkansas court rejected that contention and sustained the superiority of the attorney's fees.

It goes unchallenged that the claim for attorney's fees, arising out of the obligations assumed by the taxpayer in 1958, became enforceable under Arkansas law as a contract of indemnity at the time of default in October 1960 before the filing of the first federal tax liens. Furthermore, it is evident that the suit in which these attorney fees were earned was commenced on March 24, 1961, prior to the filing of the unpaid federal tax liens crucial to this suit, *i.e.*, the liens of April 14, July 17, and October 3, 1961.

---

[3] The first two liens, November 29, 1960, and January 30, 1960, were satisfied in full. $546.68 was available for partial payment of the April 14, 1961, lien. The balance of the April lien and the full amounts of the July 16, and October 3, 1961, liens remained unsatisfied.

[4] The United States did not challenge the priority of the mechanic's lien or of any other distribution fixed by the decree.

[5] Once the attorney's fees are subordinated to the federal tax liens, the $1,250 would be borne by the other claimants in order of seniority among themselves under state law. On the basis of the present decree, the share of the mechanic's lienor Anderson would be eliminated and that of the second mortgagee, The Development Company, reduced in half.

Nevertheless, because these fees had not been incurred and paid and could not be finally fixed in amount until November 15, 1961, after all the federal liens had been filed, we [fol. 68] hold that the claim for attorney's fees remained inchoate at least until that date and that the federal tax liens are entitled to priority.

The priority of the federal tax lien provided by 26 U. S. C. § 6321 as against liens created under state law is governed by the common-law rule—"the first in time is the first in right." *United States* v. *New Britain*, 347 U. S. 81, 85-86. It is critical, therefore, to determine when competing liens, whether federal- or state-created, come into existence or become valid for the purpose of the rule.

The tax lien arises, according to § 6322, when the tax is assessed, but as against the specific interests mentioned in § 6323 (a)—mortgagees, pledgees, purchasers and judgment creditors—it is not valid until placed of public record, and insofar as the federal lien attaches to securities, mortgagees, pledgees and purchasers must have actual notice of the lien,[6] § 6323 (c).

As for a lien created by state law, its priority depends "on the time it attaches to the property and becomes choate." *United States* v. *New Britain*, *supra*, at 86; *United States* v. *Security Tr. & Sav. Bank*, 340 U. S. 47. Choate state-created liens take priority over later federal tax liens,

---

[6] "While it is true that the filing of the notice of the tax lien may constitute notice in the case of real property, it is inequitable for the statute to provide that it constitutes notice as regards securities. For example, when a broker purchases a security for his customer on the exchange, it is obviously impossible for him to check all the offices in which a notice of the tax lien may be duly filed to determine whether the security is subject to such lien. A like situation exists with respect to over-the-counter and direct transactions in securities. An attempt to enforce such liens on recorded notice would in many cases impair the negotiability of securities and seriously interfere with business transactions. The adoption of the amendment will remove an existing hardship without causing any undue loss of revenue." H. R. Rep. No. 855, 76th Cong., 1st. Sess. 26 (1939).

United States v. *New Britain, supra; Crest Finance Co.* v. *United States,* 368 U. S. 347, while inchoate liens do not. See *United States* v. *Liverpool & London Ins. Co.,* 345 U. S. 215; *United States* v. *Scovil,* 348 U. S. 218; *United States* v. *Collatta,* 350 U. S. 808. And it is a matter of federal law when such a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed [fol. 69] federal tax lien.[7] "Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." *United States* v. *New Britain, supra,* at 86. The federal rule is that liens are "perfected in the sense that there is nothing more to be done to have a choate lien . . . when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *Id.,* at 84.

We reject respondents' contention that the choateness rule has no place when a mortgage under § 6323 (a) is involved. The predecessor to § 6323 was first enacted by Congress in 1912 in order to protect mortgagees, purchasers and judgment creditors against a secret lien for assessed taxes and to postpone the effectiveness of the tax lien as against these interests until the tax lien was filed. H. R. Rep. No. 1018, 62d Cong., 2d Sess. The section dealt with the federal lien only and it did not purport to affect the time at which local liens were deemed to arise or to become choate or to subordinate the tax lien to tentative, conditional or imperfect state liens. Rather, we believe Con-

---

[7] "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to re-examination by this Court." *United States* v. *Security Trust & Sav. Bank,* 340 U. S. 47, 49-50; see also, *United States* v. *Acri,* 348 U. S. 211; *United States* v. *Vorreiter,* 355 U. S. 15. Thus the fact that, under Arkansas law, the claim for attorney's fees becomes enforceable upon default as a contract of indemnity does not foreclose inquiry by this Court into the degree the claim is choate at that time.

gress intended that if out of the whole spectrum of state-created liens, certain liens are to enjoy the preferred status granted by § 6323, they should at least have attained the degree of perfection required of other liens and be choate for the purposes of the federal rule.

The Court has never held that mortgagees face a less demanding test of perfection than other interests when competing with the federal lien. Indeed *United States* v. *Ball Constr. Co.*, 355 U. S. 587, stands for just the contrary. There the state law creditor, asserting that the assignment [fol. 70] under which he claimed was mortgage within the predecessor to § 6323, insisted upon priority over the federal lien by virtue of the previously executed assignment. A majority of the Court, although not expressly declaring the assignment to be a mortgage, held that § 6323 (a) afforded the creditor no protection since his interest was "inchoate and unperfected." The four dissenters thought the assignment was a mortgage and that it was "completely perfected" and "in all respects choate." While disagreeing on the choateness of the particular assignment involved there, the Court was unanimous in applying the choateness test to those seeking the protection of § 6323 (a). We follow that lead here and therefore proceed to measure against the rule, the choateness of the mortgagee's lien for reasonable attorney's fees before us.

Clearly the identity of the lien holder and the property subject to the lien are definite here, but it is equally apparent that the amount of the lien for attorney's fees was undetermined and indefinite when the federal tax liens in question were filed.[8] The mortgage held by respondents secured a promissory note which obligated the mortgagor maker to pay a "reasonable attorney's fee in the event of default" and "of placing of the note in the hands of an attorney for collection." By the time the federal liens subordinated by the Arkansas courts were placed of public

[8] There is nothing in *Security Mortgage Co.* v. *Powers*, 278 U. S. 149, which compels us to hold the lien choate since the issue there was the status of an attorney's fee clause, fixed in amount, in bankruptcy proceedings where the rigorous federal lien choateness test was not necessarily applicable.

record, default had occurred, the mortgagee had elected to declare the note due and payable, an attorney had been engaged and a suit to foreclose the mortgage had been filed. But the "reasonable attorney's fee"—reasonable in relation to the service to be performed by the attorney—had not been reduced to a liquidated amount. The final amount was to be established by court decree and the Chancery Court set the fee considerably below the sum requested. Moreover, there is no showing in this record that the mortgagee had become obligated to pay and had paid any sum of money for services performed prior to the filing of the federal tax lien.

[fol. 71] *Ball* once again provides a parallel. Sums due the contractor-taxpayer under a particular construction contract were assigned to the surety as security for any future indebtedness of the contractor to the surety arising under that contract or any other. After the filing of the federal tax lien against the contractor, the surety made advances to complete another contract of the taxpayer, as the surety was obligated to do under its bond issued on that contract, and the taxpayer thereby became indebted to the surety. The majority held the surety's interest "imperfect and inchoate" at the time of the filing of the federal tax liens.[9] *Ball* therefore rejects as inchoate an assignee's or mortgagee's lien to secure future indebtedness of the taxpayer-debtor. The creditor holds "merely a *caveat* of a more perfect lien to come." *New York* v. *Maclay*, 288 U. S. 290, 294. Likewise, when a mortgagee has a lien for an attorney's fee which is uncertain in amount and yet to be incurred and paid, such a lien is inchoate and is subordinate to the intervening federal tax lien filed before the mortgagee's lien for attorney's fee matures.[10]

---

[9] Contrast *Crest Finance Co.* v. *United States*, 368 U. S. 347, where the assignment and the loans were consummated prior to the accrual and filing of the federal tax liens.

[10] See in accord, with respect to attorney's fees, *United States* v. *Bond*, 279 F. 2d 837 (C. A. 4th Cir.); *In re New Haven Clock & Watch Co.*, 253 F. 2d 577 (C. A. 2d Cir.); *Bank of America* v. *Embry*, 188 Cal. App. 2d 425, — P. 2d —; with respect to payments of subsequently attaching local taxes, *United States* v. *Bond*, *supra*; *United States* v.

But, it is said, the principal and interest of the mortgage were definite in amount, the attorney's fee later became certain by court order [11] and if the tax lien were to prevail the preference of the mortgagee given by § 6323 will be frustrated since payment of the attorney's fee will reduce the net amount realized from the mortgage. Aside from [fols. 72-73] the fact that the mortgagee here will experience no such reduction,[12] this argument would subordinate federal tax liens to inchoate liens and in both *United States* v. *New Britain* and *United States* v. *Buffalo Savings Bank*, 371 U. S. ——, the Court denied priority to local tax liens which were imperfect when the federal tax lien was filed even though the former had priority over the mortgage and would reduce the recovery of the mortgagee.[13]

The court below was in error and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Douglas dissents.

Christensen, 269 F. 2d 624 (C. A. 9th Cir.); and with respect to future advance clause transactions, *American Surety Co.* v. *Sundberg*, 58 Wash. 2d 337, 363 P. 2d 99; Rev. Rule 56-41, 1956-1 Cum. Bull.; cf. *United States* v. *Peoples Bank*, 197 F. 2d 898 (C. A. 5th Cir.); *Hoare* v. *United States*, 294 F. 2d 823 (C. A. 9th Cir.).

[11] This argument would require us to revitalize the long since rejected relation-back doctrine. See *United States* v. *Security Trust & Sav. Bank*, 340 U. S. 47, 50.

[12] See note 5, *supra*.

[13] By the same token respondents' contention that the rules against "unjust enrichment" are violated by preferring the tax lien to the claim for attorney's fees is without merit. Both *New Britain* and *Buffalo Savings Bank* prefer the federal lien even though the mortgagee's interest in the proceeds will be reduced by later-arising local taxes having priority under state law over the mortgagee. The attorney's services, moreover, were rendered for the benefit of the mortgagee to protect his interest in the property, and the United States, holding an adverse interest, received no such benefit from them that its interest is to be charged therefor.

[fols. 74-75] IN THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—July 3, 1963.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro Clerk. By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 76] Clerk's certificate to foregoing transcript (omitted in printing.)

[fol. 77] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—December 9, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 716087 999